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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3706

FRANK T. BRZOSOWSKI,
Appellant

v.

PENNSYLVANIA TURNPIKE COMMISSION; GOVERNOR OF PENNSYLVANIA; PENNSYLVANIA TURNPIKE COMMISSIONERS, individually and as agents and employers of the PTC; WILLIAM K. LIEBERMAN, Chairman; A. MICHAEL PRATT, Esquire, Vice Chairman; PASQUALE T. DEON, SR., Secretary Treasurer; SEAN LOGAN, Commissioner; BARRY J SCHOCH, P.E. Secretary of Transportation; PATRICIA SCHLEGEL, individually and as agent and employee; JUDY TREASTER, individually and as agent and employee; DOROTHY ROSS, individually and as agent and employee; PATRICK CARO, individually and as agent and employee; JILL DAVIS, individually and as agent and employee; DAVID SMITH, individually and as agent and employee; LYNN FEEMAN, individually and as agent and employee; "TROOP T" OF THE PENNSYLVANIA STATE POLICE; CPL. SHAWN KERNAGHAN, Bowmansville PSP Office, (Lancaster County) individually and as agent and employee

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 5-15-cv-02339)
District Judge: Honorable Lawrence F. Stengel

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 11, 2017

Before: GREENAWAY, JR., VANASKIE and ROTH, Circuit Judges

(Opinion filed: June 20, 2018)

OPINION*

PER CURIAM

Frank T. Brzozowski appeals from the District Court's orders dismissing his complaint and amended complaint. We will affirm the former with one modification but will vacate the latter and remand for further proceedings.

I.

Brzozowski filed this civil action raising two distinct sets of claims against two distinct sets of defendants. First, Brzozowski asserted claims under 42 U.S.C. § 1983 against a Pennsylvania state police officer, a state police "troop," and former Pennsylvania Governor Thomas W. Corbett (the "law enforcement defendants"). These claims were based on the officer's stop of Brzozowski's vehicle and issuance of a citation.

Second, Brzozowski asserted claims against the Pennsylvania Turnpike Commission and some of its employees (the "Commission defendants"). Brzozowski, who was employed by the Commission until it terminated him, claimed that the Commission defendants discriminated against him on the basis of his age, gender and national origin in violation of Title VII of the Civil Rights Act of 1964 and other anti-discrimination statutes.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

All defendants filed motions to dismiss under Fed. R. Civ. P. 12(b)(6), with some invoking Rule 12(b)(1) as well. The District Court granted them by order entered February 26, 2016. As to the law enforcement defendants, the District Court concluded that Brzozowski's claim against the trooper in his personal capacity was barred by the statute of limitations. It further concluded that his claims were otherwise barred by Eleventh Amendment immunity and because there is no respondeat superior liability under § 1983. Thus, the District Court dismissed those claims with prejudice. The District Court also dismissed with prejudice Brzozowski's claims of discrimination against the individual Commission defendants. As to the Commission itself, the District Court concluded that Brzozowski failed to adequately plead claims of discrimination, but it dismissed those claims without prejudice and with leave to amend.

Brzozowski later filed an amended complaint asserting those claims and numerous others, including claims that the Commission defendants retaliated against him for his political beliefs and what he characterized as political speech and whistleblowing activity. The Commission defendants moved to dismiss the amended complaint under Rule 12(b)(6). The District Court directed Brzozowski to file a response to their motion, but he failed to do so. The District Court then granted the motion as unopposed and dismissed the amended complaint. Brzozowski appeals.¹

II.

¹ We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the dismissal of claims under Rule 12(b)(6). See Palakovic v. Wetzel, 854 F.3d 209, 219 (3d Cir. 2017). We review for abuse of discretion the dismissal of an action as a sanction. See Briscoe v. Klaus, 538 F.3d 252, 257 (3d Cir. 2008).

Brzozowski challenges both the dismissal of his initial complaint and the dismissal of his amended complaint. We will affirm the former with one modification but will vacate the latter and remand for further proceedings.

A. Dismissal of the Initial Complaint

The District Court dismissed all of Brzozowski's initial claims with prejudice except his discrimination claims against the Commission. Brzozowski raises a number of arguments addressed to these rulings, but only one issue warrants discussion.²

Brzozowski asserted claims against Pennsylvania State Police Trooper Shawn Kernaghan based on Kernaghan's stop of Brzozowski's vehicle and issuance of a citation for driving between 85 and 90 miles per hour on the Pennsylvania Turnpike. Brzozowski contested the citation. At a hearing before a Pennsylvania District Judge, Kernaghan later testified that he got a "good VASCAR reading" on Brzozowski's speed. The judge found Brzozowski guilty and, after a trial de novo, a Common Pleas judge found him guilty as well. Brzozowski appealed to the Pennsylvania Superior Court, but that court dismissed his appeal as untimely.

Brzozowski claimed that Kernaghan falsely arrested him and then lied at the hearing when he testified that he got a VASCAR reading. The District Court, without expressly identifying the nature of Brzozowski's claim, concluded that it was untimely as measured from either the date of the stop or the date of the hearing.

² To the extent that Brzozowski did not replead in his amended complaint the claims that the District Court dismissed with prejudice, those claims nevertheless are preserved for review because amendment would have been futile. See Palakovic, 854 F.3d at 220.

We agree in part. Brzozowski's complaint, along with his Rule 12(b)(6) response, can be read to assert claims for false arrest, malicious prosecution, and fabrication of evidence in violation of his due process rights. We agree that Brzozowski's claim for false arrest was untimely. Kernaghan stopped Brzozowski and issued the citation on November 28, 2012. Brzozowski's claim for wrongful arrest (if an arrest it was) accrued at that time. See Wallace v. Kato, 549 U.S. 384, 388 (2007). Thus, under the two-year statute of limitations applicable to § 1983 claims in Pennsylvania, see Kach v. Hose, 589 F.3d 626, 635 (3d Cir. 2009), Brzozowski had until November 28, 2014, to assert this claim. Brzozowski filed his complaint on April 27, 2015.

That leaves Brzozowski's claims for malicious prosecution and fabrication of evidence based on Kernaghan's testimony regarding VASCAR. Brzozowski argues that these claims are timely because they are based on a letter from the Turnpike Commission stating that "VASCAR is not used on the turnpike," which he did not receive until June 29, 2013. (ECF No. 13 at 22.)

These claims, however, require a different analysis. Brzozowski claims that Kernaghan lied about obtaining a VASCAR reading in order to frame him and, as he now puts it on appeal, he seeks to "clear his name." (Appellant's Supp. Br. at 23.) Thus, these claims necessarily imply the invalidity of his conviction and will not accrue unless and until it is invalidated. See Heck v. Humphrey, 512 U.S. 477, 484-87 (1994) (malicious prosecution); Curry v. Yachera, 835 F.3d 373, 379 (3d Cir. 2016) (same); Long v. Atlantic City Police Dep't, 670 F.3d 436, 447 (3d Cir. 2012) (fabrication of evidence). For that reason, these claims are not untimely and instead are premature. We

will therefore modify the District Court's dismissal of these claims to reflect that they are dismissed without prejudice. See Curry, 835 F.3d at 379. We will otherwise affirm the District Court's dismissal of Brzozowski's initial complaint for the reasons it explained.³

B. Dismissal of the Amended Complaint

Brzozowski also challenges the dismissal of his amended complaint. The District Court dismissed it after granting the Commission defendants' Rule 12(b)(6) motion as unopposed. A dismissal on that basis is not really a dismissal for failure to state a claim and instead is a sanction. See Stackhouse v. Mazurkiewicz, 951 F.2d 29, 30 (3d Cir. 1992). Before taking the drastic step of dismissing an action as a sanction, District Courts generally must balance the factors set forth in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984). See Briscoe, 538 F.3d at 258.⁴ A District Court's failure to do so often warrants remand. See Livera v. First Nat'l State Bank of N.J., 879 F.2d 1186, 1194 (3d Cir. 1989).

³ We reject Brzozowski's remaining arguments, including his arguments that the District Court should have struck a motion to dismiss because of when he served the defendants who filed it and that the District Court should have permitted discovery at the pleading stage. Brzozowski also appears to challenge the District Court's dismissal without prejudice of his discrimination claims against the Commission for lack of specificity. Brzozowski may have waived any such challenges by repleading these claims in his amended complaint instead of standing on his initial complaint. See United States ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 516 n.16 (3d Cir. 2007) (citing, *inter alia*, Davis v. TXO Prod. Corp., 929 F.2d 1515, 1517 (10th Cir. 1991)). In any event, we agree with the District Court that Brzozowski failed to allege facts raising a plausible inference of discrimination.

⁴ Those factors are: "(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary . . .; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense." Poulis, 747 F.2d at 868 (emphasis omitted).

Remand is warranted in this case. The District Court did not acknowledge the Poulis factors. Instead, in dismissing Brzozowski's amended complaint, the District Court merely noted that: (1) it directed Brzozowski to respond to the Commission defendants' motion; (2) it warned him that failure to respond might result in dismissal; and (3) Brzozowski nevertheless failed to respond. These considerations are relevant to some of the Poulis factors, *see Doe v. Megless*, 654 F.3d 404, 412 (3d Cir. 2011); Briscoe, 538 F.3d at 258, 262, but they do not warrant dismissal by themselves.

Moreover, before dismissing an action as a sanction sua sponte, "the District Court should provide the plaintiff with an opportunity to explain his reasons for failing to . . . comply with its orders[.]" Briscoe, 538 F.3d at 258. The District Court did not do so here. Had the District Court done so, then the parties could have presented the arguments that they now raise on appeal. Brzozowski asserts that he never received the District Court's order requiring him to respond to the Commission defendants' motion and that he thus assumed that the District Court was extending a previously entered stay. The Commission defendants dispute that assertion. This forum is not the proper one for this dispute. *See Livera*, 879 F.2d at 1194. The District Court should address this issue and the Poulis factors in the first instance if it pursues the issue of sanctions further instead of ruling on the Commission defendants' Rule 12(b)(6) motion on the merits.⁵

⁵ Brzozowski provided the District Court with his explanation for failing to respond in a post-judgment motion to reopen. The motion was timely under Fed. R. Civ. P. 59(e), but the District Court dismissed it as moot in light of this appeal. We do not review that ruling because Brzozowski did not file another notice of appeal to challenge it. *See* Fed. R. App. P. 4(a)(4)(B)(ii). For the District Court's benefit, however, we note that it should

Finally, the Commission defendants ask us to affirm on the alternative ground that Brzozowski's amended complaint fails to state a claim. The District Court should address that issue too in the first instance, either as part of the Poulis analysis or in ruling on the Commission defendants' Rule 12(b)(6) motion on the merits. We express no opinion on the merits except to note that the Commission defendants have raised only a statute of limitations defense to some claims that Brzozowski asserted for the first time in his amended complaint but that defendants have not addressed the possibility of relation back. See Fed. R. Civ. P. 15(c). Thus, we will vacate and remand for further proceedings as to the amended complaint.

III.

For these reasons, we will affirm the District Court's dismissal of Brzozowski's initial complaint but will modify its order to reflect that the dismissal of Brzozowski's claims for malicious prosecution and fabrication of evidence are dismissed without prejudice. We will also vacate the dismissal of Brzozowski's amended complaint and remand for further proceedings. Brzozowski's pending motions are denied.

have construed Brzozowski's motion as a Rule 59(e) motion and that this appeal did not render it moot. See Fed. R. App. P. 4(a)(4)(B)(i).